IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-419

PITTSBURGH PRESS COMPANY, *Petitioner,*

v.

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS AND THE CITY OF PITTSBURGH,
AND
THE NATIONAL ORGANIZATION FOR WOMEN, INC.

MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Comes now the American Newspaper Publishers Association, by and through its counsel, and pursuant to Rule 42(3) of this Court, respectfully moves this honorable Court for leave to file an amicus curiae brief

in support of the petition of the Pittsburgh Press Company for a writ of certiorari to the Supreme Court of Pennsylvania, for the following reasons:

1. The American Newspaper Publishers Association (hereinafter "ANPA" or "Association") is a non-profit, membership corporation organized and existing under the laws of the State of New York. Its membership consists of more than 1,000 daily newspapers representing over ninety percent of the total daily and Sunday newspaper circulation in the United States. The Pittsburgh Press, the Pittsburgh Post-Gazette, and seventy-four other newspapers throughout Pennsylvania hold membership in the ANPA.

2. The Petitioner, The Pittsburgh Press Company, and one of the Respondents, The National Organization for Women, Inc., have consented to the filing by the ANPA of a brief amicus curiae in support of the petition for a writ of certiorari. A copy of their written consents have been filed herewith. The ANPA participated in every tribunal below as an amicus. However, the Respondents, the Pittsburgh Commission on Human Relations and the City of Pittsburgh, will not consent to the filing of a brief amicus curiae in this proceeding.

3. The issues presented in this proceeding involve two fundamental points: the propriety, under a city ordinance, of sex-designated column headings in the classified, help-wanted advertising sections of the Petitioner's newspaper; and, the constitutional propriety of the proceedings below wherein the Petitioner's newspaper was found to have "aided and abetted" an unlawful employment practice under the contested city

ordinance by merely maintaining such sex-designated column headings, without any concomitant finding that a specific employer-advertiser, by requesting insertion of an advertisement under a particular column heading, commits an unlawful practice which is "aided and abetted" by Petitioner.

4. These issues are of major importance to a majority of the Association's member newspapers. A significant number of the ANPA's members utilize a system of classifying help-wanted advertising almost identical to the Petitioner's system under attack in this case. Because these members have found that this help-wanted classification system serves the interests of a vast majority of newspaper readers and advertisers; because this manner of advertising display represents more than mere commercial activity and involves essential editorial prerogatives; because the Pittsburgh ordinance in question, and similar ordinances and statutes, exempt many employers and jobs, the Association's member newspapers believe that they are entitled to preserve this system.

5. To our knowledge, this is the first state litigation involving the legality of sex column headings in employment advertising sections of newspapers. For this reason, this case obviously will have great impact throughout this country. Because of this impact, the Association desires to present to this Court for its assistance, the views of its members in regard to the constitutionality, under the First Amendment free press clause and under the Fourteenth Amendment due process clause, of the application of Section 8(j) of the Pittsburgh Human Relations Ordinance to newspapers. The ANPA is hopeful that this Court will

grant review of the important issues raised by this proceeding.

Respectfully submitted,

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ANSWER TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the ordinance of the City of Pittsburgh prohibiting a newspaper from arranging help-wanted advertisements under columns labeled "Jobs—Male Interest," "Jobs—Female Interest," and "Jobs—Male—Female" violate the First Amendment of the United States Constitution?

(Answered in the negative by the Court below.)

2. Did the proceedings before the City of Pittsburgh Human Relations Commission in any way violate petitioner's right to due process of law?

(Answered in the negative by the Court below.)

COUNTER-STATEMENT OF THE CASE

Respondents are in basic agreement with the p
cedural history set forth by petitioner in its Statem
of the Case.

Respondents are compelled, however, to point o
certain omissions and one misstatement in petitione
synopsis of the evidence presented at the hearing b
fore the Human Relations Commission. Althou
respondents are of the view that the development
constitutional issues does not require an analysis
the evidence, petitioner has referred to a portion
the evidence and respondent is forced to refer to t
record to dispel any possible misapprehension. Vo
ume II of the record on appeal to the Commonweal
Court of Pennsylvania is composed of documenta
evidence showing how petitioner's advertisements a
employers to discriminate against women.

Furthermore, evidence was indeed introduced
prove that a female was refused a job advertised u
der the "Jobs-Male Interest" classification.

ARGUMENT

I. The Prohibition of Sex-Segregated Newspaper Advertisements Does Not Violate the First Amendment

The Commonwealth Court of Pennsylvania, in discussing this issue, stated that the Amicus, the American Newspaper Publishers Association, had raised the "specter" of an alleged violation of the newspaper's right to freedom of the press (R. 65a). The Court's appellation is apt, for an issue so lacking in substance is difficult to imagine. The great constitutional guarantee is prostituted when it is sought to be applied in the instant situation.

The City of Pittsburgh Commission on Human Relations, an administrative body created for and devoted to the ideal of protecting civil rights, the Court of Common Pleas of Allegheny County, and the Commonwealth Court of Pennsylvania, all considered this issue, and found petitioner's First Amendment argument totally lacking in merit. They cited numerous cases, both federal and state, holding that commercial advertising may not avoid police power regulation by crying "First Amendment."

This Honorable Court in *Branzburg v. Hayes*, U.S. , 92 S. Ct. 2646, 2657 (1972), has recently had occasion to uphold the validity of state statutes

of general applicability which incidentally affect the press:

> "It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases, otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed. The Court has emphasized that '[t]he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and properties of others.' Associated Press v. NLRB, 301 U.S. 103, 132-133, 57 S. Ct. 650-656, 81 L. Ed. 953 (1937). It was there held that the Associated Press, a news-gathering and disseminating organization, was not exempt from the requirements of the National Labor Relations Act. The holding was reaffirmed in Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 192-193, 66 S. Ct. 494, 497-498, 90 L. Ed. 614 (1946) where the Court rejected the claim that applying the Fair Labor Standards Act to a newspaper publishing business would abridge the freedom of press guaranteed by the First Amendment. See also Mabee v. White Plains Publishing Co., 327 U.S. 178, 66 S. Ct. 511, 90 L. Ed. 607 (1946). Associated Press v. United States, 326 U.S. 1, 65 S. Ct. 1416, 89 L. Ed. 2013 (1945), similarly overruled assertions that the First

Amendment precluded application of the Sherman Act to a news gathering and disseminating organization. Cf. Indiana Farmer's Guide Publishing Co. v. Prairee Farmer Publishing Co., 293 U.S. 268, 276, 55 S. Ct. 182, 184, 79 L. Ed. 356 (1934); Citizen Publishing Co. v. United States, 394 U.S. 131, 139, 89 S. Ct. 927, 931, 22 L. Ed. 2d 148 (1969); Lorain Journal Co. v. United States, 342 U.S. 143, 155, 156, 72 S. Ct. 181, 187-188, 96 L. Ed. 162 (1951). Likewise, a newspaper may be subjected to nondiscriminatory forms of general taxation. Grosjean v. American Press Co., 297 U.S. 233, 250, 56 S. Ct. 444, 449, 80 L. Ed. 660 (1936); Murdock v. Pennsylvania, 319 U.S. 105, 112, 63 S. Ct. 870, 874, 87 L. Ed. 1292 (1943).

"The prevailing view is that the press is not free with impunity to publish everything and anything it desires to publish. Although it may deter or regulate what is said or published, the press may not circulate knowing or reckless falsehoods damaging to private reputation without subjecting itself to liability for damages, including punitive damages, or even criminal prosecution. See New York Times Co. v. Sullivan, 376 U.S. 254, 279-280, 84 S. Ct. 710, 725-726, 11 L. Ed. 2d 686 (1964); Garrison Publishing Co. v. Butts, 388 U.S. 130, 147, 87 S. Ct. 1975, 1987, 18 L. Ed. 2d 1094 (1967) (opinion of Harlan, J.); Monitor Patriot Co. v. Roy, 401 U.S. 265, 277, 91 S. Ct. 621, 628, 28 L. Ed. 2d 35 (1971). A newspaper or a journalist may

also be punished for contempt of court, in appropriate circumstances. Craig v. Harney, 331 U.S. 367, 377-378, 67 S. Ct. 1249, 1255-1256, 91 L. Ed. 1546 (1947)."

The First Amendment does not protect expression which is "no essential part of any exposition of ideas." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S. Ct. 766 (1942). It is well settled, in particular, that while "freedom of communicating information and disseminating opinion" enjoys a high degree of protection, "the Constitution imposes no such restraint on government as respects purely commercial advertising." *Valentine v. Chrestenson*, 316 U.S. 52, 56, 62 S. Ct. 920 (1942).

In Note, *Freedom of Expression in a Commercial Context*, 78 Harv. L. Rev. 1191 (1965), it is stated:

> "The possibly desirable objectives furthered by advertising would not seem to require its protection by the First Amendment, particularly since the primary purpose of commercial advertising is to advance the economic welfare of business enterprises, over which state and federal governments enjoy wide powers of regulation."

As the Court of Common Pleas of Allegheny County stated in this case (R. 43a):

> "It is difficult to think of a more commercial aspect of the paper than captions to the classified advertising section."

A holding that the City of Pittsburgh Human Relations Ordinance, in prohibiting sex-segregated want

ads, violates the First Amendment, would doom also numerous federal statutes regulating advertising, the constitutionality of which statutes has been consistently upheld both by this Court and by the lower federal courts.

Probably the enactment closest to the ordinance here involved is §804(c) of the Civil Rights Act of 1968, 42 U.S.C. §3604(c), which provides as follows:

> §3604. Discrimination in the sale or rental of housing
>
> (c) [It shall be unlawful] to make, print, or publish, or cause to be made, printed, or published, any notice, statement, or advertisement with respect to the sale or rental of a dwelling that indicates any preference, limitation or discrimination based on race, color, religion, or national origin or an intention to make any such preference, limitation, or discrimination."

In *United States v. Hunter*, 459 F. 2d 205 (4th Cir. 1972, Sobeloff, S. J.), petition for certiorari filed July 15, 1972, and pending at No. 72-146, the Government sought an injunction against a newspaper which had published certain discriminatory advertisements. Although refusing an injunction, the District Court entered a declaratory judgment sustaining the constitutionality of the above-quoted section against the assertion that it was violative of the newspaper's First Amendment rights. The publisher, represented by the same counsel which represented the Amicus, American Newspaper Publishers Association,

in the instant proceedings, appealed to the Court of Appeals for the Fourth Circuit, which affirmed in a lengthy and erudite opinion. In the portion of the Court's opinion of particular relevance to this proceeding, the First Amendment argument was rejected on the basis of the line of cases following *Valentine v. Chrestenson*, supra, the "unbroken line of authority from the Supreme Court down which distinguishes between the expression of ideas protected by the First Amendment and commercial advertising in a business context." 459 F. 2d at 211.

The Fourth Circuit opinion in *Hunter* notes that the constitutionality of §3604(c) as applied to newspapers has been upheld by the District Court in *Holmgren v. Little Village Community Reporter* (No. 70 C 2236, N.D. Ill., 1971). The constitutionality of §3604(c) was also sustained in *United States v. A. B. Smythe Company, Inc.* (No. C 69-885, N.D. Ohio, 1970).[1]

Similar statutes have also withstood attack on First Amendment grounds. Although the Court in *Greenfield v. Field Enterprises, Inc.*, 4 EPD ¶7763 (N.D. Ill. 1972), held that the clear language of §703(b) of the Civil Rights Act of 1964, 42 U.S.C. §2000(e)-2(b), excludes newspapers from its coverage, the Court pointed out in dictum that the section is not violative of the First Amendment in prohibiting help-wanted listings under separate male and female headings:

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[1] A copy of this opinion can be found as an Appendix to the brief of the United States in the Court of Appeals in *Hunter*, supra, certiorari now pending at No. 72-146.

Argument

"A first amendment issue has been raised in this case in the brief of the Chicago Tribune Company. This defendant sees the relief sought in this case as a prior restraint on freedom of the press, and clear violation of well-established first amendment protections, and condemns it as a most insidious encroachment upon cherished American rights.

This alarm is without basis. In addition to being the conduits for the transmission of facts and opinions to the American public, newspapers are businesses. In their commercial aspect, they enjoy no special first amendment privileges. If their practices in the commercial business of publishing classified advertisements for compensation violate the Civil Rights Act of 1964, or particularly Title VII, Section 706(b) of that Act, the first amendment does not shield them from the consequences of their activity."

Clearly, under this decision, an employer or labor union or employment agency which published a circular, or which placed an ad in a newspaper with separate male and female headings would be violating the Act. It was so held in *Hailes v. United Air Lines*, 41 U. S. Law Week 1082 (5th Cir. 1972).

The Court in *Camp-of-the Pines v. New York Times Co.*, 184 Misc. 389, 53 N.Y.S. 2d 475 (Sup. Ct. 1945), construed Section 40 of the New York Civil Rights Law to prohibit discriminatory advertising by newspapers. When the "Times" printed the plaintiff's ads without the language "selected clientele", the camp sued for breach of contract. The

Court found that this was code for no blacks or Jews, just as the Commission here found that the headings "Jobs—Male Interest" and "Jobs—Female Interest", constitute a discriminatory device. As one of its bases for granting the "Times' " motion for summary judgment, the Court held that the newspaper would be breaking the law if it printed a discriminatory ad.

Several other federal statutes which prohibit advertising of one type or another have been held not to run afoul of the First Amendment. In *Capital Broadcasting Co. v. Kleindienst*, 405 U.S. , 92 S. Ct. 1289 (1972), aff'g. 333 F. Supp. 582 (D. D.C. 1971) (three-judge court), the Act of April 1, 1970, Pub. L. 91-222, §2, 84 Stat. 89, 15 U.S.C. §1335, prohibiting cigarette advertising on any medium of electronic communication subject to the jurisdiction of the FCC, was held to be constitutional as against First Amendment attacks. The three-judge court pointed out that advertising is not protected the same way other forms of speech are, and stated that Congress has the power to prohibit the advertising of cigarettes in *any* media. See also *Banzhof v. F.C.C.*, 405 F. 2d 1082 (D.C. Cir.) (1968), cert. denied sub. nom. *Tobacco Institute, Inc. v. FCC*, 396 U.S. 842, 90 S. Ct. 50 (1969). Similarly, the Council of the City of Pittsburgh has the authority under its police power to prohibit advertising that aids in discrimination.

In *New York State Broadcasters Assoc. v. United States*, 414 F. 2d 990 (2d Cir. 1969), cert. denied, 396 U.S. 1061, 90 S. Ct. 752 (1970), the Court held that the Act of June 25, 1948, c. 645, 62 Stat. 763, 18 U.S.C. §1304, prohibiting the broadcasting of

lottery information, did not violate the First Amendment.

Even where advertisements are politically motivated, not the situation here by any stretch of the imagination, the courts have sustained their prohibition where reasonable requirements imposed under the police power have not been followed. See *United States v. Scott*, 195 F. Supp. 440 (D. N.D. 1961), upholding against attack on First Amendment grounds the Act of June 25, 1948, c. 645, 62 Stat. 764, 18 U.S.C. §612, prohibiting the publication or distribution of political campaign statements which do not contain the names of those responsible for such statements.

New York State Broadcaster's Assn. v. United States, supra, is a particularly important case, for the Court dealt at length with the shibboleth which petitioner has raised here, that the ordinance, as interpreted by the Commission and the courts below, represents the "official government view" that discrimination against women is improper, but that the Press should be free to follow another view. The Court aptly answered that argument:

> ". . . [I]nvoking the specter of an official government view does not dispose of the real issues before us. There is an 'official' government view as to the sale of narcotics, see 21 U.S.C. §§173, 174, the offering of fraudulent securities, see 15 U.S.C. §78j(b), the interstate transportation of wagering paraphernalia, see 18 U.S.C. §1953, and the coercion of employees by employers, see 29 U.S.C. §158(a)(1), to name

only a few. And the view extends to communications which are designed to—and do—directly effectuate these unwanted results. Clearly an advertisement listing the names and addresses of sellers of narcotics or of fraudulent stock could constitutionally be barred. Of course, we do not suggest that lotteries are a swindle or that lotteries and uncontrolled sale of narcotics are equally deserving of condemnation, but Congress had the power to have a 'view' as to these types of conduct and to take steps to inhibit each. Nor do we see a viable distinction here because there is legislative unanimity as to swindling or narcotics but a difference of opinion as to lotteries.

"The real point here is that we are not primarily in the realm of ideas at all but are chiefly concerned with speech closely allied with the putting into effect of prohibited conduct." 414 F. 2d at 996-7.

Neither are we in the realm of ideas in the instant case. The Court of Common Pleas made that clear (R. 43a):

"The Order of the Commission in no way interferes with the editorial or news content of the newspaper. The Press may continue to express its editorial views with freedom. It may editoralize on this elimination of sex-segregated column headings or any other position related to the status of women supported by the publisher and editor. It may report the news on the subject as it sees fit."

It simply may not arrange its advertising columns in such a manner as to aid in discrimination. As the Court stated in *Hunter*, supra, at 212:

> "[A] newspaper will not be insulated from the otherwise valid regulations of economic activity merely because it also engages in constitutionally protected dissemination of ideas."

Hunter is also significant for its treatment of the "prior restraint" argument which petitioner makes here, based upon *Near v. Minnesota*, 283 U.S. 697, 51 S. Ct. 625 (1931). Like the "official government view" argument, it is a vital doctrine in its place, but it is misplaced here, as it was in *Hunter* and in the cases cited therein:

> "Congressional regulation of commercial advertising is not barred by Near v. Minnesota, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931), which condemned unlawful prior restraints on free speech. The Supreme Court and lower courts have frequently rejected First Amendment attacks on injunctions when the enjoined conduct or expression was not fully protected by the First Amendment. Lorain Journal Co. v. United States, supra (unanimous opinion upholding injunction prohibiting commercial advertisements of others in violation of the antitrust laws); Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 439, 31 S. Ct. 492, 55 L. Ed. 797 (1911) (upholding injunction against union newspaper promoting boycott). See also Head v. New Mexico Board of Examiners, 374 U.S. 424, 432 N. 12, 83 S. Ct. 1759, 10 L. Ed. 2d

983 (1963) (injunction restraining newspaper from publishing optometrist's advertising affirmed against attack based on the due process clause.)"

Finally, *Hunter* disposes of petitioner's lament that it is made into a screening device, as an enforcement arm of the Commission. Petitioner is not put in any sort of awkward position. It merely must refuse to place any advertisement in a sex-segregated column unless the employer provides a bona fide occupational exemption certificate. See the Commission's Adjudication (R. 13a). If the employer does not produce such a certificate, the sex-segregated ad constitutes discrimination. Thus, here, as in *Hunter*, unlike statutes which make false advertising a crime:

". . . a newspaper publisher can easily distinguish between permissible and impermissible advertisements in discharging his duty . . ." 459 F. 2d at 213.

In summary, while one is always reluctant to assert that a petition raising an issue involving the fundamental guarantee of freedom of the press is frivolous, it should be apparent that both this Honorable Court and numerous other Courts have over and over again rejected the arguments made by petitioner here, and have held that advertising such as this is not protected by the First Amendment.

II. The Order That Petitioner Desist From Aiding Employers To Discriminate Was Not Violative of Due Process of Law

Petitioner's second argument asserts a violation of due process of law because petitioner was ordered to eliminate sex-segregated advertising columns without proof that an advertiser actually discriminated in hiring.

It would appear that petitioner has here abandoned the claim made below that it was denied due process because the complaint did not *allege* a violation by a particular employer. Petitioner does quote from Judge Mencer's opinion on this issue, however, and respondent therefore feels compelled to point out that petitioner had ample notice of the charges against it. The complaint filed by Gerald Gardner on behalf of complainant NOW clearly described the act of discrimination as follows:

> "The National Organization for Women charges the Pittsburgh Press with deliberate and constant violations of Section 8(j) of the Human Relations Ordinance as amended by Ordinance 395. The National Organization for Women has attempted on several occasions to convince editors and publishers of the Pittsburgh Press that their policy of allowing employers to place advertisements in the male or female columns, when the jobs advertised obviously do not have bona fide occupational qualifications or exceptions, is unlawful."

Argument

The Commonwealth Court held (R. 56a):

> "We hold that the Pittsburgh Press was properly and adequately informed of the charged violation of Subsection 8(j) of the Pittsburgh Human Relations Ordinance, as amended. The appellant newspaper had notice and knowledge of the charge that it was aiding employers to unlawfully discriminate by the placing of employment advertisements under the arbitrarily segregated male and female columns on the advertising pages of the newspaper."

The basic thrust of petitioner's argument here seems to be that it was improperly ordered to eliminate its sex-segregated advertising columns because there was no proof as asserted at page 16 of the Petition, "that any advertiser has in fact used its classified advertisements as a device to deny women equal consideration for employment positions."

Discrimination is defined in §4(B) of the ordinance, as amended by Ordinance No. 395, approved July 7, 1969, as follows:

> "(B) Discriminate or discrimination—
>
> The terms 'discriminate' and 'discrimination' include any difference in treatment based on . . . sex." (R. 107a).

In its adjudication, the Pittsburgh Commission on Human Relations ruled as follows:

> "An employer by causing an employment advertisement to be placed in either the male interest column or female interest column is, in

our judgment, indicating a difference in treatment as to that employment based upon sex, hence engaging in unlawful discrimination." (R. 9a).

Such a conclusion is self-evident and could be sustained absent any evidence whatsoever. As stated by the Court of Appeals for the Fifth Circuit dealing with sex discrimination against males in *Hailes v. United Air Lines*, supra:

> ". . . the placing of the ad in the 'Help Wanted—Female' column without a corresponding ad in the 'Help Wanted—Male' column so plainly indicates a preference for females it cannot be neutralized by the self-conferred title of 'Equal Opportunity Employer.' "[2]

Moreover, as the Commission pointed out, the United State Equal Employment Opportunity Commission, the United States Department of Labor, the Civil Rights Commission of Colorado, and the Nebraska Equal Opportunity Commission have all ruled that the placement of an advertisement in columns headed "Male" or "Female" will be considered an expression of discrimination based on sex (R. 11a-12a).

In addition, however, evidence from petitioner's own Classified Ad Manager, Robert Seli, amply proves that employers who advertise in the "Jobs—

[2] Prior to October of 1969, petitioner's captions read "Male Help Wanted," "Female Help Wanted" and "Male-Female Help Wanted." Since that time to the present they have read "Jobs-Male Interest," "Jobs-Female Interest", and "Male-Female Help." (R. 16a) (Footnote added.)

Male Interest" or "Jobs—Female Interest" columns are discriminating. At page 150a of the record on appeal in the Commonwealth Court, Mr. Seli's testimony was as follows:

"Q. As far as employment opportunity ads are concerned, do your ad takers have the discretion to place jobs in any particular column if the advertiser does not express any preference?

A. No, sir, most of the people who call in have a preference. Let's put it this way. They know where they want the ad to run—automobile or real estate or male interest or female interest. They express this interest where they would like to have this ad placed. In what category. At times, when they do not express a preference, we ask them where they would prefer to have it placed.

Q. If the advertiser clearly expresses a preference for male or female, the Press abides by the preference expressed by the advertiser?

A. Yes, but there is a little difference here. If somebody asks to place a help wanted ad under automobile advertising, we will not accept it. It has to run under help wanted. It's a job offering. It's run under opportunities.

Q. When no preference is expressed by advertisers, you then solicit from the advertiser a response to whether he has a preference?

A. Yes, where they would prefer to have it placed.

Q. In case there is no preference expressed, even after solicitation, who then at the Pittsburgh Press decides which column it goes in?

A. I don't think we have this problem, really.

Q. In each case there is an expression of preference by the advertiser?

A. Yes."

Again, at page 207a of the same record (quoted in the Commission's Adjudication, R. 9a), the same sort of testimony appears:

"Q. Is this the only type of—if I may use the word—education for your advertisers? Do you then proceed to tell them of the several categories that should go under this or that, take your choice?

A. We tell them where the majority is—or we try to find out what type of a person they are looking for. Are they looking for a man, or are they looking for a woman? They know this. And they are interested or more interested in a man or more interested in a woman. They know this, and they state this. This is where they want it."

This is unmistakable evidence that petitioner is aiding employers to discriminate.

In its argument heading, petitioner alleges an absence of proof that an advertiser discriminated in "hiring" in violation of the ordinance. It is unclear to respondents exactly what petitioner means by this statement. If petitioner believes that it is necessary to show that an advertiser who advertised in the "Jobs—Male Interest" column actually refused to hire a female, petitioner ignores the fact that §§8(a) and 8(e) of the Ordinance are separate provisions

(R. 92a-93a). Section 8(a) prohibits refusal to hire, but §8(e) prohibits the placing of a discriminatory advertisement, regardless of whether there is a refusal to hire. As we have just seen above, the advertising was discriminatory. Furthermore, although such evidence is superfluous in order that respondents prevail, the evidence does show, as the opinion of the Commonwealth Court majority point out (R. 58a), that a female who had responded to an ad in the "Jobs—Male Interest" column was refused hiring on the basis of her sex. The testimony of Mrs. Ruth Anderson revealed that she responded to an ad placed in the "Jobs—Male Interest" column for a dishwasher and was advised by an agent of the employer that he had been given specific instructions not to hire a female for the advertised job.

If on the other hand, petitioner is asserting that respondents have not shown that a *particular* employer was violating the ordinance, again the argument is wide of the mark. Respondents have proved violations by numerous employers. The record is replete with advertisements placed in the male column or the female column by particular employers. Almost the entire Volume II of the Record in the Commonwealth Court is devoted to this. Furthermore, the parties stipulated that twenty-five percent of the employers advertising in the Press were located in Pittsburgh. The Commission concluded (R. 12a) that every non-exempt employer who placed an advertisement in the male column or the female column was in violation of §8(e). Surely it is unnecessary to prosecute any or all of the 248,000 persons (or at

least the 62,000 in the City of Pittsburgh) who used the Press Want Ads. The ordinance has no requirement that enforcement proceed against the employer as well as the newspaper. In both *United States v. Hunter,* supra, and *Holmgren v. Little Village Community Reporter,* supra, the proceedings were against the newspapers only, not against those who placed the ads.

While petitioner cries "due process", petitioner is in fact seeking to direct both complainant NOW and the Commission in the enforcement of the ordinance. Petitioner would prefer that enforcement proceedings would proceed employer by employer or advertiser by advertiser, rather than by a single proceeding directed at the root source of the discriminatory advertising.

It is an elementary principle of law that the failure to prosecute all violators does not render an action against one who has violated the law discriminatory or improper. *United States v. Hunter,* supra, at 220.

Respondents have determined that one of the best methods to achieve the eradication of the evil of sex discrimination, an evil well recognized by this Honorable Court in *Reed v. Reed,* U.S. , 92 S. Ct. 251 (1971), is to proceed against those who enable discrimination to flourish, by publishing discriminatory advertisements. Such a method is nowhere prohibited by the ordinance.

Finally, it should be noted that while petitioner couches its argument in terms of due process of law, it is not in actuality complaining about a lack of due

process, but rather of an alleged misconstruction of the ordinance, or an alleged insufficiency of evidence to support the Commission's order. It is respectfully suggested that these are issues of state law over which the Supreme Court of Pennsylvania is the final arbiter.

CONCLUSION

For the above reasons, respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

EUGENE B. STRASSBURGER, III,
Exec. Asst. City Solicitor,

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Attorneys for Respondents.

process, for neglect of an alleged misconception of the ordinance, or an alleged insufficiency of its support, the Commissioner's order. It is suggested that these are matters of state law, the Supreme Court of Pennsylvania is the [illegible]

CONCLUSION

For the above reasons, respondent respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

No. 72-419 October Term, 1972

PITTSBURGH PRESS COMPANY

v.

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS AND THE CITY OF PITTSBURGH

and

THE NATIONAL ORGANIZATION FOR WOMEN, INC.

OBJECTION TO BRIEF OF AMICUS CURIAE

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pose such a petition unless petitioner agreed to file
its petition for certiorari not later than August 25,
1972. Petitioner so agreed. Although the petition for
certiorari was not actually filed until September 12,
1972, respondents were supplied a draft of the brief
on or about August 25, 1972, and do not complain
about petitioner's late filing.

Argument

OBJECTION TO BRIEF OF AMICUS CURIAE

Respondents, the Pittsburgh Commission on Human Relations and the City of Pittsburgh, have withheld their consent to the filing of a brief amicus curiae in this proceeding. The reason for their so doing is the dilatory nature of such brief.

It is now more than three years since the complaint was filed in this case, and despite the fact that every tribunal considering the issues has agreed with respondents' position, the sex-segregated ads have continued unabated.

The order of the Supreme Court of Pennsylvania denying allocatur was dated June 21, 1972. Shortly thereafter, counsel for petitioner was advised by counsel for respondents that unless a supersedeas were obtained, respondents would take further action to enforce the ordinance. A petition for supersedeas was then filed in the Supreme Court of Pennsylvania. Counsel for respondents indicated that he would oppose such a petition unless petitioner agreed to file its petition for certiorari not later than August 25, 1972. Petitioner so agreed. Although the petition for certiorari was not actually filed until September 12, 1972, respondents were supplied a draft of the brief on or about August 25, 1972 and do not complain about petitioner's late filing.

Argument

However, respondents do complain about the attempt of the American Newspaper Publishers Association to file an Amicus Brief three and one-half months after the order of the Pennsylvania Supreme Court denying allocatur, and one and one-half months after the agreed-upon deadline for petitioner to file its petition for certiorari. The petitioner and the American Newspaper Publishers Association have worked in conjunction throughout these proceedings. This late filing of the Brief can only be considered an evasion of the parties' stipulation with regard to the supersedeas. Respondents do not intend to file a response to the Amicus Brief because, fortunately, respondents have anticipated the arguments raised therein. Such a fortuity should not detract from the fact that the Amicus is here attempting to file a brief which might have required an involved response which would have resulted in considerable delay.

Respectfully submitted,

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RALPH LYNCH, JR.,
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